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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 890

CLAYTON CHEMICAL & PACKAGING CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner imported into the United States a new coal tar product known as "Phenidone," which is useful in photographic development. The proper basis for appraisement of this product for customs purposes was its "United States value," which (insofar as here relevant) is defined in Section 402(e) of the Tariff Act of 1930, as amended, 19 U.S.C. 1402(e), as "the price at which such * * * imported merchandise is freely offered for sale * * * in the principal market of the United States to all purchasers * * * in the usual wholesale quantities and in the ordinary course of trade * * *" (Pet. App. 2–3).

In determining the United States value of the

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Phenidone, the appraiser of merchandise took into account all domestic sales of the product by petitioner during the pertinent period. All but 7 of these sales (out of a total of 49 sales) were in quantities of less than 100 pounds (Pet. App. 5–6).[1] On its appeal for reappraisement filed in the Customs Court, petitioner contended that its sales involving such small quantities were not sales "in the usual wholesale quantities and in the ordinary course of trade" and, therefore, should not have been considered by the appraiser in ascertaining United States value. To support that contention, petitioner introduced into evidence affidavits from 14 of its customers which purported to show that their purchases in less than 100 pound lots were mainly for experimental purposes (Pet. App. 5–6).[2] The offered justification for the use of the affidavits was 28 U.S.C. 2633, which provides that, in reappraisement proceedings in the Customs Court, affidavits "of persons whose attendance cannot reasonably be had" may be admitted in evidence (R. 74).[3]

[1] There were 49 sales of the product between June 19, 1953 and January 27, 1954. All but 8 of these sales were in quantities of 5 pounds or less, and 13 of the sales were in quantities of 1 ounce (Pet. App. 5). Seven sales were in quantities of 100 pounds or more (Pet. App. 6).

[2] In connection with a provision quite similar to Section 402(e), the Customs Court had previously upheld a ruling that sales for experimental purposes were not sales "in the ordinary course of trade" where the experimental sales in small quantities numbered 3 out of 235 sales. *United States* v. *H. Muehlstein & Co.*, 42 Cust. Ct. 760.

[3] "R." references are to pages of the transcript of record in the Court of Customs and Patent Appeals. The transcript has been filed with this Court.

Relying in substantial measure on the affidavits, the single judge of the Customs Court upheld petitioner's position and redetermined the United States value of the merchandise on the basis of only the 7 sales by petitioner which were in quantities of 100 pounds or more (R. 84–85).[4] The government appealed to the Appellate Term of the Second Division of the Customs Court, urging, *inter alia*, that the affidavits had been improperly admitted into evidence because petitioner had not established that the attendance of the affiants could not "reasonably be had" (R. 90–91). The United States contended that, as a consequence, there was insufficient evidence to overcome the presumption of correctness which attached to the appraiser's valuation by reason of 28 U.S.C. 2633 (R. 89–91).

The Appellate Term affirmed on the ground that the United States had not properly preserved its objection to the admissibility of the affidavits (R. 97).[5] The United States then appealed to the Court of Customs and Patent Appeals, which reversed the determination that the government had not preserved its objection to the admissibility of the affidavits (Pet. App. 11) and further held that the affidavits were not admissible because petitioner had failed to establish that the attendance of the witnesses could not reasonably have been had.[6] In the latter regard, the court pointed to the uncontested fact that 9 of the 14 affiants were

[4] The decision is reported at 49 Cust. Ct. 409.

[5] The decision is reported at 52 Cust. Ct. 620.

[6] Petitioner conceded in the Court of Customs and Patent Appeals that, in the absence of the affidavits, there was insufficient evidence to overcome the presumption of correctness attaching to the appraiser's valuation (Pet. App. 17).

residents of either New York or New Jersey and agreed with the government that "their oral testimony at a trial or pre-trial session of the Customs Court could easily have been arranged with little inconvenience to all concerned, [petitioner's] trial counsel at the time being himself a New York attorney" (Pet. App. 16). It concluded (*ibid.*):

> We are not persuaded from the facts and circumstances here adduced that [petitioner] has made a proper showing, as was incumbent upon it so to do, that the attendance of the persons executing the affidavits in issue could not reasonably have been had. Mere inconvenience of litigants or witnesses should not suffice to deprive an adversary in litigation of the substantial and time honored right of confronting and cross-examining witnesses of the opposing party.

Finally, the court held that "the major portion, or greatest number of sales or offers for sale in a wholesale quantity constitute the usual wholesale quantity" within the meaning of Section 402(e) of the Tariff Act (Pet. App. 18–19). Hence, the appraiser had correctly considered the 42 sales in quantities of less than 100 pounds in addition to the 7 sales of more than 100 pound quantities in determining value; because of their numerical preponderance, such small sales, regardless of their experimental purpose, were to be deemed the usual wholesale quantity. In this regard, the court found inapplicable the decision in *United States* v. *H. Muehlstein & Co.*, 42 Cust. Ct. 760, holding sales of small quantities for testing purposes not to be sales in the ordinary course of trade where such sales constituted a very small percentage of total

sales (see footnote 2, *supra,* p. 2). The court therefore reversed the decision of the Customs Court and reinstated the appraiser's valuation.[7]

On petition for rehearing, petitioner raised for the first time the contention that, if the affidavits were inadmissible, it was entitled to a remand to the Customs Court to enable it to introduce further evidence. This petition was unanimously denied, without opinion.

DISCUSSION

Petitioner contends that the Court of Customs and Patent Appeals was in error both in holding the affidavits inadmissible and in refusing to remand for further proceedings.[8] Both of these issues turn wholly upon the particular facts of this case; their resolution by the Court of Customs and Patent Appeals was, in addition, clearly correct.

1. The Court of Customs and Patent Appeals correctly concluded that petitioner had failed to establish that it could not reasonably obtain the attendance of, at the very least, the 9 affiants residing in New York or New Jersey. While these individuals lived more than 100 miles from Chicago, where the trial was conducted (R. 74), their oral testimony at a trial or pretrial session of the Customs Court in New York could easily have been arranged. Consequently, it could

[7] Chief Judge Worley concurred in the result. Judges Smith and Rich dissented (Pet. App. 20–23).

[8] Petitioner does not here challenge the holding below that the government had preserved its objection to the admissibility of the affidavits.

not be said that their attendance "could not reasonably have been had" (Pet. App. 16).

2. Similarly, the decision of the Court of Customs and Patent Appeals not to remand the case to the Customs Court to afford petitioner a second opportunity to establish its case on the merits (Pet. 5–7) was a proper exercise of the court's discretion. In the court's view of the merits—a view not challenged in the petition—the undisputed fact that 42 of the 49 relevant sales had been of quantities less than 100 pounds established that sales at such small quantities were properly considered by the appraiser as sales of the usual wholesale quantity. This was true, in the court's view, regardless of the fact that such sales were for experimental or testing purposes; the court distinguished a holding of the Customs Court that sales for experimental purposes were not in the ordinary quantity on the ground that in that case the experimental sales had constituted a very small percentage of total sales. In these circumstances there would have been little purpose in remanding for a second trial at which petitioner, at most, would have sought to show, through the witnesses whose affidavits were offered at the first trial, that the small sales were for experimental purposes. In addition, not only did petitioner belatedly ask for a remand for a second trial only in his petition for rehearing but, as we have shown in the previous paragraph, petitioner had little, if any, justification for refusing to endeavor to obtain,

in the first instance, the attendance of most of the 14 persons whose affidavits he relied upon.[9]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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[9] In this connection, we note that, when petitioner first attempted to introduce the affidavits in the single-judge proceeding, the court ruled that they were inadmissible (R. 49). The judge changed his ruling only when, at another hearing five months later, petitioner once again offered the affidavits rather than endeavoring to obtain the testimony of the affiants.

END